

OCTOBER 13. 1796.

ANS. Robert Stewart, Esq; &c.

TO

2d RECL. PET. William Heron.

W. Beveridge, W. S. Agent.
H.

*The Water of Maitry which impels
is the Meln Lead, and it follows
its natural course from the place
called the Intake quite a new
name for Brown's Maitry, about
1/2 mile the Land of St. Fort where
it is embarked, & carried down
a ditchial Lead, to the Meln*

A N S W E R S

FOR

ROBERT STEWART, Esq; of St Fort, and JOHN
GREIG, his Tenant in Hay's Mill,

TO THE

SECOND RECLAIMING PETITION of WILLIAM
HERON, Tenant in the Lands of Cruivie.

THE water which supplies Hay's mill is not collected by any artificial aqueduct, acquired in the way of servitude from some of the neighbouring proprietors, as might be supposed from the statement in the petition.

The grounds for a considerable space above the *intake*, as it is called, are intersected by a rivulet, which, in ancient times, must have spread over the low grounds of Cruivie, and a great part of the adjoining property. This is evident from the name of *Cruivie Inch*, or Island, by which these grounds were formerly distinguished, and also from the appellation of *Lochend*, still given to the Proof, p. 6. G, H.

A

higher

higher part of the grounds adjoining the lead which belong to the respondents.

At this time, however, the proprietor of the lands of St Fort, by possessing the grounds where Hay's mill is built, and where
 Proof, p. 18. I, G. there is a fall of three feet ten inches, must have had the command of the water, even although he had not been proprietor of any of the grounds to the westward; and a natural rising of the ground nearly where the fourth cross ditch from the westward now is, and extending to a considerable way to the north, must have nearly answered the purpose of a mill-dam, so as to secure a constant supply to the mill.

At what period the conterminous proprietors were induced to render the water-course less hurtful to them by confining it within a cut or aqueduct from the intake downwards to the mill, and whether this was done at a time when the whole belonged to one proprietor, cannot now be discovered. The inquiry, indeed, appears to be of no importance, because, in virtue of long and immemorial possession, the situation of the parties must be the same as if the mill-lead had been the natural drain of the surrounding grounds: and in fact it is so, the only difference being, that the water is narrowed and confined within the mill-lead or aqueduct, instead of being allowed to spread over the whole.

The mill-lead is in general from fourteen to twenty feet broad.

Such was the situation of these grounds in the year 1720, when Robert Edie became tenant of the lands of Cruvie. Partly to prevent the water which descended from the higher grounds on the south from overflowing Cruvie Inch, and partly to receive the water from three cross ditches, which were about the same time made by him, he was at pains to make a ditch, which was called the *Land Stank*, running from east to west in the same line with what is now called the *Main Drain*.

Annexed to the
 first reclaiming Pe-
 tition.

The cross ditches made by Robert Edie were in the same line with the three marked on the plan as nearest the intake; but they were dug where the ground was solid, and they were very inconsiderable both in depth and wideness, being intended as much as possible to prevent the water in ordinary seasons from covering the higher parts of Cruvie Inch. Great care, too, was taken to prevent any communication between the water at the intake and the land-stank, a considerable space being left between the two; and as the land-stank was very narrow, and al-

so of very inconsiderable depth, hardly any water could pass by it from the higher parts of Cruivie Inch down to the lower grounds.

This important circumstance the petitioner has chosen altogether to omit, although it is clearly established by proof, and indeed not denied. If the cross ditches dug by Robert Edie had been sufficient to carry the water in the higher parts of Cruivie Inch to the land-stank, and if the land-stank had been sufficient to convey the water downwards to the tail-lead of the mill, the water, when it overflowed the banks of the mill-lead, must have been carried off immediately; and if the cross ditches had been only eighteen inches or two feet deep, the whole water in the mill-lead, which was of no greater depth, must have been carried off in that manner, as soon as any breach was made, so as to open the communication between the one and the other. Instead of this, no example has been given of the water having entirely left the channel of the mill-lead, until the petitioner commenced his operations; and when at any time the banks of the mill-lead were broken down, the breaches were easily repaired in a few hours by the possessors of Hay's mill, assisted by the tenant in the lands of Cruivie, who interposed, in order to keep the water from inundating their grounds.

Proof, p. 2. C,
D, E, F, G, H;
p. 3. G, H; p.
6. B.

On this footing matters remained till about the year 1782, the lands of Cruivie being all the while possessed by Robert Edie already mentioned, and his son, who has been examined as a witness in the present question; and no dispute either did or could reasonably arise between them and the tenants in the mill.

Mr Anstruther became proprietor of the lands of Cruive in the year 1782. It did not occur to him that he could drain his lands by carrying off the water entirely from Hay's mill; he therefore attempted to purchase the mill itself from Captain Duncan of Craigton, who was then proprietor of St Fort; but being disappointed in this, he endeavoured to make such alterations as were practicable, without injury to his neighbours.

At this time, what was called the land-stank could neither effectually discharge the whole water coming from the higher grounds on the south, nor that which collected itself within Cruivie Inch. Mr Anstruther therefore made it, in many places, from *eight to nine* feet deep, and the breadth was in some places enlarged to *twelve feet*; so that the water collected in those grounds descended

descended readily to the mill-lead, which it joined a little below the mill.

Mr Anstruther also dug other two cross ditches, being the fourth and fifth from the intake; but he was careful that those ditches should not in any place approach too near the mill-lead, and that they should also be dug where the ground was most solid, so as to prevent any danger from a communication between them and the mill-lead.

See Plan annexed
to the former Pe-
tition.

Proof, p. 2. H;
p. 14. A.

It will also be observed, that after Mr Anstruther had completed his operations on the land-stank and upon the cross ditches, he began to make another ditch parallel to the mill-lead, but at a considerable distance from it. After making some progress, however, being afraid of opening a communication between the mill-lead and the cross ditches, he desisted. It is to be noticed, that the upper part of this parallel ditch is precisely in the place where the breach was made that gives rise to the present question; and the witnesses depone, That between it and the mill-lead, a space of about forty feet, there is a swamp or bog, the grounds to the southward being more firm.

It was said when the cause was advised, that Mr Anstruther was altogether ignorant of the business in which he had engaged, otherwise he must have known, that, from the swampiness of the ground, it was of no consequence where the parallel ditch was erected, the water communicating freely throughout the whole. This observation, however, was not consistent with the circumstances of the case, and therefore it has been properly omitted in the petition. If there had been such a communication throughout the whole grounds of Cruvie, the moment the cross ditches were made lower than the channel of the mill-lead, the water must have been carried away from the mill; and instead of those expensive and laborious exertions so much talked of in the petition, in order to drain the meadows of Cruvie, it would have been necessary only to open a ditch between them and the tail-lead of the mill, which at once would have converted the whole into dry land.

The petitioner William Heron became Mr Anstruther's tenant in 1787. His first step was to make the land-stank both wider and deeper than Mr Anstruther had done; and this he dignified with the name of the Main Drain. He then widened and deepened the cross ditches which communicated with the main drain. In general,

ral, as appears from the engraved plan, their depth was from *three* to *four* feet; and as the depth of the mill-lead itself is never more than *three* feet, and in most places not more than *two* feet, and in some places not more than *ten inches*; it is evident, that as soon as any communication took place between the mill-lead and the cross ditches, the mill would be deprived of water.

These operations, therefore, were attended with very great risk. But the petitioner went still farther, by making another ditch parallel to the mill-lead, beginning at the intake, and proceeding downwards, as far as the lands of Cruivie extend. This parallel or side ditch, as it is called, is only seven or eight feet from the mill-lead; and although it is positively stated, that the petitioner did not prolong the cross ditches, this is a misrepresentation of the fact, and refuted by the proof: Particularly, it appears, that the head of the cross ditch, where the breach happened, was four or five roods more distant from the mill-lead than the new ditch.

Proof, p. 26. D, E.

In this manner, nothing was left to prevent the water of the mill-lead from going into the cross ditches, but a column of earth, in some places only about seven feet broad. Even if this had been solid, it is evident, that it would not have been sufficient for resisting the body of water which run in the mill-lead in times of flood. But the nature of the ground, which was quite a marsh or bog, rendered it no protection at all. It is in evidence, that when the people were at work in making the side ditch, they were obliged to stand upon boards or planks, as the ground would not bear their weight; and the stuff or mud below the surface was collected with *cleeks* or *hauks*, as they are called, being too soft to be moved with the spade.

Proof, p. 5. G, H;
p. 12. B; p. 17. C,
D; p. 31. A, B, C.

— p. 7. A, B.

Robert Edie depones, ' That the ground where the lead runs, — p. 1. E. .
' and where the new ditch is cast, for a considerable space on
' both sides of the head of the cross ditch, was such a swamp or
' bog before the ditch was cast, that it would scarcely carry a man
' upon it.

James Walker, after visiting the subjects, ' depones, That he — p. 5. E, F.
' tried the depth of the swamp, or marshy ground, with his staff,
' in the bottom of the ditch, by putting down its whole length;
' but could not find the bottom.'

John Mack ' depones, That in casting said ditch, (meaning the — p. 7. A.
' side ditch), in the swampy ground, the people stood upon deals,
' or some such thing, as the ground would not bear them; and
' he saw them also drawing the mots or mud to them with hanks

‘ or cleeks in making the ditch : That the first time the deponent
‘ saw them casting the ditch in that swamp, he told them, that
‘ he was certain they would play mischief, as they would carry
‘ or divert the water from the mill-lead.’

Proof, p. 9. B. Robert Laing, who was employed, with several other persons,
to cast the side ditch, depones, ‘ That when the deponent and
‘ Crombie were employed at casting at said piece of the ditch,
‘ the pursuer John Greig came to them when the defender was
‘ with them: That the said John Greig seemed to be in a passion;
‘ but the deponent does not recollect what he said, only he seem-
‘ ed to be very much dissatisfied about the casting of the ditch.’

— p. 4. E. Robert Edie, who had been so long a tenant in Cruivie, also
depones, ‘ That if he had known the defender’s intention to
‘ make the said new or side ditch, he would have advised him a-
‘ gainst it, on account of the danger of taking away the water
‘ from the mill-lead.’

— p. 8. B, C, The side ditch was completed in summer 1792, and as soon as
D; p. 11. B, C. the wet season commenced, the water forced its way from the
mill lead, at a place nearly opposite the fourth cross ditch.
After undermining the side ditch, it carried away the skin or sur-
face; and from thence, after occasioning a breach *fifty-nine feet*
wide, as appears from the engraved plan, it went in an angular
direction into the fourth cross ditch, and immediately almost the
whole water in the mill-lead, instead of pursuing its ordinary
course, found its way by the cross ditch to the main drain.

— p. 12. B, C. The consequence of all this may be easily supposed. Instead of
D. being able to serve the tenants upon the estate of St Ford, or
those who were in use to frequent the mill, who were much more
numerous, in the ordinary way, the tenant of the mill, by great
exertions, was able to accommodate the former; but the latter
were almost entirely neglected, many of them having gone to
other mills, and others who sent their grain to be manufactured,
complained very much of their disappointment.

— p. 24. A. B; The petitioner, conscious of the injury he had committed, en-
p. 5. H; p. 7. H; deavoured in some degree, to repair it. But that was not easily
p. 11. B, C, G, H; done; and an application to the Sheriff became necessary, in which
p. 12. B; p. 17. C; the damages then sustained are stated at a random sum of L. 100
p. 27. A, B, et seqq. Jan. 30. 1792. Sterling.

In the answers, the now petitioner boldly denied the fact of his
having withdrawn the water from the lead, although the contrary
is now admitted. It was also stated, that Mr Anstruther, the pro-
prietor

prietor of the lands of Cruivie, was interested in the question, and ought to be called as a party.

In a reply, the situation of the grounds was stated; and it was stated that Mr Anstruther would be cited, upon the Sheriff's giving authority for that purpose.

In a duply, it was stated, that the tenant of Hay's mill was only entitled to a free water gang; and it was insinuated, that he had raised the wheels of the mill, although the fact has since been clearly disproved. Proof, p. 16, A, B;
P. 18. D, E.

Mr Anstruther being cited, gave in a paper, in which he, in the most explicit terms, disclaimed the petitioner's proceedings; and he protested, that the petitioner was liable in damages to him, as well as to the proprietor and tenant of Hay's mill, for the innovations he had made. Vide Mr.
Page 10.

The grounds were surveyed by Alexander Brown, who made out the plan annexed to the former petition. The Sheriff allowed a proof; he also visited the grounds in person, and found that the breach in the mill-lead was occasioned by the ditches cast by the petitioner. He afterwards appointed the now respondents to give in a state of the damages they had sustained.

While these proceedings were going on, the petitioner made an application to the Sheriff, for obliging the respondents to *temper* the water, as it is called, in the mill-lead, by erecting a side sluice at the intake: But the absurdity of such a proposal being obvious, it was immediately rejected by the Sheriff, and entirely forgot in the subsequent proceedings. No notice was taken of it in any of the Lord Ordinary's interlocutors; and when the cause was advised by your Lordships, it was understood by all parties, that the writings relating to it had not been transmitted from the Sheriff-court.

It is only necessary farther to state in point of fact, that although much expence has been laid out to repair the breach in the mill-lead, it is still open, and occasions much damage to the respondents. Even at this time, although the summer and harvest have been uncommonly dry, a considerable stream runs immediately from the mill-lead to the cross ditch where the breach is; there is also a run from the side ditch to the westward, which goes the same way; and in another of the cross ditches, farther west, there is also a considerable run of water, which finds its way, first from the mill-lead to the side ditch, and afterwards from the side ditch to the cross ditch; and it must be very difficult, from the
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soft and spongy nature of the soil, altogether to remedy the evil. The allegations, therefore, in the petition on this head, are quite unauthorised, and ought not to have been made.

After this detail, it will not be necessary to consume much time in argument.

It is admitted, that the respondents and their predecessors have enjoyed the mill and mill-leads belonging to it, without any alteration, for time past all memory.

It is also admitted, that the breach in question was occasioned by the petitioner's operations in attempting to drain the lands of Cruivie.

If the petitioner had acknowledged all this at an earlier period, a considerable expence might have been saved; but there can be no longer any doubt about it. And as the petitioner was fully warned of his danger, the question must be treated in the same manner, as if he had at once opened a communication between the mill-lead and the main drain, so as immediately to carry off the water from the respondents mill.

The only subject of consideration therefore is, whether the petitioner might warrantably perform those operations, however hurtful to the respondents mill; and this the petitioner has endeavoured to show in various ways.

And, 1st, It is said, that the petitioner and his predecessors in the lands of Cruivie had been in the immemorial usage of opening drains for the cultivation of their property; and that although some damage was thereby occasioned, the proprietors and tenants of Hay's mill never offered any complaint.

The answer to this argument, which indeed is now very faintly urged, will readily appear. It is not the fact, that those possessing the lands of Cruivie before the petitioner, ever opened drains, so as to divert the water from the mill-lead. Before the year 1782, when Mr Anstruther became proprietor of Cruivie, the water from the mill-lead, even when it overflowed the lands of Cruivie, could not be carried off in any other way than by the mill-lead itself, to which it returned when the water in the mill-lead became lower.

Besides, although it has been proved that there were breaches in the mill-lead, opposite, or nearly so, to the cross ditches made by Robert Edie, there is no evidence that the breaches were occasioned by those cross ditches. Robert Edie, to avoid it, used great care in chusing the most solid parts of the ground; and it was
much

much his interest to do so, because the land-stank, as constructed by him, was insufficient to carry off the water when it overflowed Cruivie Inch.

But it is unnecessary to say more on this subject, it being an admitted fact, that at no period before the petitioner became tenant of Cruivie, did the water entirely leave the channel of the mill-lead. Indeed the thing was impossible; and if the petitioner had observed the same attention as his predecessors, he might have completely drained his grounds without injuring the mill-lead; and this, either by making no side-ditch at all, or by keeping it and the cross ditches at a sufficient distance from the mill-lead, or by fencing those parts of the margin of the lead where the ground was soft in a proper manner.

The practice, therefore, of the former possessors of Cruivie, so far from justifying the petitioner, must have a quite opposite effect. Accordingly, he now maintains, that he was under no obligation to follow the example of his predecessors. He contends, that he was intitled, without any circuit or subterfuge, to carry off the water from the mill-lead, as being necessary for draining his grounds; and, *2dly*, That the respondents were themselves obliged to relieve his grounds from every inconvenience arising from the mill-lead, and at their sole expence to do every thing necessary for that purpose.

In this argument, it will be observed, the arrangement is somewhat singular. If the respondents were obliged to remove every inconvenience to which the petitioner was subjected in consequence of the mill-lead, instead of being at the expence of draining his grounds, he ought to have brought an action for obliging the respondents to protect his property, and, at the same time, to make up the damages occasioned by their past neglect.

The respondents, therefore, will follow a different order, by considering, *1st*, What they were bound to do in order to drain the petitioner's grounds; and, *2dly*, Whether it was competent or necessary, for accomplishing that purpose, that the petitioner should divert the water from the mill-lead.

The petitioner has quoted the authority of Mr Erskine, and some decisions, to show that a person who has purchased the servitude of an aqueduct through his neighbour's ground, is obliged to preserve the dam-heads and water-courses, so that the adjacent grounds may suffer no prejudice from the breaking out of the wa-

ter ; and if the respondents had acquired right to the mill-lead in question by special grant from the petitioner or his landlord, these authorities would no doubt be of some importance.

The case here, however, is altogether different. If the right to the mill-lead could be ascribed to a servitude, it would be one, not constituted by grant, but by prescriptive use and possession ; and, in such a case, the law is undoubted, that the possession must regulate the interests of all the parties.

So far, therefore, as the respondents have been hitherto accustomed to repair the mill-lead, and to regulate the water in it, they would unquestionably be obliged to observe the same care in all time coming ; but if, on the other hand, they have been under no restraint of that kind, the respondents, with confidence, maintain, that your Lordships could not impose any new obligation upon them. Although, for supplying the mill with water, it had been necessary to overflow the whole grounds of Cruivie, they conceive it to be clear, that the petitioner, if he wanted to improve his lands, would have been obliged to purchase an immunity from the respondents ; and that in no other way could he relieve his property from a burden submitted to by him and his predecessors for a period far exceeding the years of prescription.

The petitioner has contrasted the great value of his grounds with the small rents that are paid for the mill ; and he seems to think that the latter should yield to the former. If your Lordships could listen to such considerations, it might be stated, that although the rent of the mill had been fixed at sixteen bolls of grain, when the current lease was granted in the year 1774, (in fact it amounted to twenty bolls, a sow, and other prestations), it would at present yield a much larger sum. But if the mill did not yield any rent at all ; if it was maintained at a very heavy annual expence, and without producing any advantage ; that surely could not induce your Lordships to violate a right of property to which no objection is or can be made. It is an insult to the justice of the Court, to suppose that it would.

It is unnecessary, therefore, to consider the various expedients proposed by the petitioner for securing his lands. Indeed, if he is to be believed, he has already in the most complete manner accomplished that purpose, the breach complained of having been repaired, and the land, formerly wet and marshy, so effectually drained, that it now yields crops of wheat equal to any which grow on the farm. But although the case were otherwise, it is thought to be

be quite clear, that even upon the footing of the respondents having only a right of servitude in the mill-lead, they are not obliged to do more than they have hitherto done for protecting the adjoining grounds. Still, however, the expedients proposed by the petitioner are so visionary and extravagant, that the respondents will be pardoned for taking some notice of them.

It has been proposed then, that the respondents should begin with *puddling* the mill-lead, that is, casing it with clay, so as to prevent any of the water from gradually breaking out into the adjoining grounds. This it is said would protect the petitioner's property in ordinary times. And in order to carry off the water which would overflow the banks of the mill-lead in rainy seasons, it is farther proposed, that the respondents should erect a sluice at the intake, or at least in some other parts of the ground, whereby the water unnecessary for the purposes of the mill may be carried away without returning again to the mill-lead.

The petitioner has not said what the expence of these operations would be. But when it is remembered, that the mill-lead in question is about a mile and a half in length, nearly 15 feet broad, and from two feet to one foot in depth, your Lordships will be able to form some estimate on this subject, and whether the respondents ought to be burdened with the expence of such an undertaking.

But that is not all: Although the respondents are altogether unacquainted with this kind of work, it being a new invention, and not hitherto used in the county of Fife, they understand, that it can only answer in the case of water carried by an artificial cut through grounds which are naturally dry. Even there, it is necessary to exclude every kind of moisture from both sides of the aqueduct by means of side-ditches. But where the ground is wet and marshy it cannot be followed, but the bottom of the aqueduct or water-course must be composed of masonry. In such a case as the present, therefore, it would not answer at all.

But supposing that the mill-lead were *puddled*, as it is called, or even cased with brick or stone, this would only protect the neighbouring grounds when the water was in its ordinary state. During the rainy seasons, it would be of little or no use, unless some method was devised for taking away the superfluous water. Your Lordships will therefore consider what is to be farther done for that purpose.

If a sluice were to be prepared at the intake, it is obvious that this could not be done by the respondents, because the lands of St Ford do not reach within half a mile of it. But supposing it erected, how is it to be regulated? Is the tenant of Hay's mill to keep a man waiting day and night at the intake until it shall be necessary to open the sluice? Such a proposition cannot be seriously maintained; and yet, without some provision of that sort, the erecting a sluice at the intake could serve no manner of purpose; and as to the proposal of making a sluice farther down, as is suggested in the petition, about N^o 11. in the engraved plan, it is evident, 1st, That it could be of no use for protecting the higher grounds; and, 2^{dly}, That unless the respondents were to convert the grounds belonging to them below N^o 11. into a mill-dam or reservoir, no benefit could be derived from this operation, which is not gained at present by the opening of the sluice at the mill itself, and this is always done when there is more water in the mill-lead than is necessary for the purposes of the mill. This will more clearly appear from inspecting the sketch of Hay's mill annexed to the former answers, which conveys a more accurate idea of the subjects in dispute than the plan engraved by the petitioner.

The respondents, therefore, submit, that if they had right to the mill-lead only in virtue of a servitude, they could not be obliged to perform these expensive and laborious operations which have been already considered. The situation of the parties, however, is extremely different. The water with which the respondents mill is supplied is produced by a rivulet or natural run of water which flows through the grounds above the mill for several miles; and the only alteration which has been made upon it, is by confining the water at the intake, where it would have spread over the whole adjoining grounds, within the channel of the mill-lead. And your Lordships are to consider, whether, in such a case, there is any obligation upon the respondents to expend more than the value of their property in protecting the grounds of Cruvie? Such a proposition appears to be in the highest degree absurd and unjust.

The respondents have always understood, that a man cannot be forfeited of his property who is guilty of no fault, and that, in the case of lands, equity cannot interpose to justify any alteration in the state of a man's property, even where his neighbour's would derive an actual profit from it, and although he himself could al-
ledge

ledge no prejudice from the alteration. Such was the determination of your Lordships in the noted question between the Earl of Eglinton and Mr Fairlie, decided 27th January 1744. But the idea of obliging a person to incur a certain expence, whether great or small, in altering the situation of his property, for the purpose merely of enriching his neighbour, is altogether new, and it is hoped will never be listened to.

Holding it therefore as a clear proposition, that the respondents are not obliged to make any alteration on the state of the mill-lead for the improvement of the petitioner's grounds, it remains to be considered, whether the petitioner himself may not, at his own expence, make such an alteration, although the respondents property will be thereby essentially injured. The petitioner has used a good deal of argument upon this point, and yet it does not appear to be attended with any doubt.

The laws quoted by the petitioner from the Pandects have been often resorted to on similar occasions; and it is always the case, that a bad decision, or an erroneous opinion laid down by a lawyer of eminence, is more frequently resorted to than any other. But the slightest attention will be sufficient to show, that the authorities do not support the petitioner's argument, but the contrary.

L. 1. § 3. 4. 5.
De Aqua. § 12.
ibid.

In one of the authorities quoted by the petitioner, it is stated, That, in the opinion of *Quintus Mucius*, the action *Aquæ pluviae crescendæ* was not competent where *an alteration was made with the plough for the necessary cultivation of lands*. This opinion *Trebatius*, another lawyer, considered as just, only *where the ground was to be sown with grain*, which in Italy was an object of national attention, the Romans being in general obliged to bring that commodity at a great expence from Egypt and other distant places. *Mucius* adds, That even *ditches for draining grounds* may be made *with the view of preparing them for a crop of grain*, although the surrounding grounds may be hurt; but that this is illegal, where it is not done merely for drying the ground, but for the purpose of collecting the water into one stream.

This is the amount of the laws as quoted in the petition; and it requires very little illustration. 1st, It is evident that the present case falls under the exception, the operations performed by the petitioner, so far as they carry the water from the mill-lead, not being performed by the plough, nor for the purpose of draining the

lands, but in order to collect the whole water into one stream, which, even in the opinion of the Roman lawyers, was not in any case admissible.

2dly, The doctrine thus laid down is neither just in itself, nor followed in practice. It is absurd to suppose that a man can be intitled to injure his neighbour, for the purpose of raising one crop more than another. A modern farmer would laugh at the idea of his neighbour's being intitled to overflow his grounds, for the purpose of raising any crop whatever. It would not only be unjust, but altogether inextricable, each neighbour thus having the same right to throw his lands into tillage, and thereby to overflow adjoining property ; so that the result would be a mutual loss, without advantage either to the parties or to the community.

In another authority quoted by the petitioner, it is stated, That where a man, in digging his own grounds, happens to cut the veins of a spring which supplies his neighbour's lands, he is not liable in damages, if he has acted merely with a view of improving his own property, and not for the purpose of injuring his neighbour's. With all deference, however, to the Roman lawyers, the respondents must maintain a contrary proposition, and that no man is intitled to deprive his neighbour of any of the natural advantages of his lands, whether by a work performed below the surface or above it. And with regard to rivulets or perpetual streams of water running above ground, such as the one in question, the proposition is so clearly established, as not to admit of any doubt.

Lord Stair gives it as his opinion, that in general ' without a ' servitude, water may not be altered or diverted from its ' course.' Book 2. tit. 7. § 12. It has been so determined, where the person objecting to the alteration could not qualify any damage but that of depriving him of the pleasure of fishing trouts, 25th June 1624, Bannatyne. The same decision was given in a question between the Town of Aberdeen and Menzies of Pitfodles, 22d November 1758, where it was found, that Mr Menzies could not, at his own expence, make any alteration upon the state of a river, although he offered security for indemnifying the conterminous heritors of every loss which might accrue to them from the alteration. And in the case of Kelfo *contra* Boyds, 1st July 1768, your Lordships *in terminis* found, that

‘ a superior heritor had no right to divert the water of a rivulet
 ‘ within his own grounds, so as to prevent its returning into its
 ‘ natural course, upon entering into the lands of the inferior heritor.’

If however a superior heritor cannot make any alteration upon the state of a private river or rivulet, even where he is proprietor of the grounds on both sides of it, it is impossible to imagine, that in this case the petitioner can be authorised to divert any part of the mill-lead in question, which is the natural drain of the lands, without the consent of the respondents, who are not only proprietors of the opposite grounds, but have a separate interest in the water for supplying their mill. Although it were absolutely necessary for draining his ground, the petitioner could not perform any operation of that kind. But he has already told your Lordships, that this is by no means the case; and that, while on the one hand his grounds have been already completely drained, the breach in question has been effectually repaired, so as to prevent all communication between the mill-lead and the ditches made by him.

It is in vain therefore for the petitioner to hold out the unfavourable nature of the right thus claimed by the respondents, and the great injury which he and the proprietors of the lands of Cruivie must sustain if he were obliged to preserve the run of water which supplies the respondents mill. All this, if he is to be believed, is mere embellishment, and irrelevant to the issue. But although the keeping up of the mill-lead was quite inconsistent with the petitioner's schemes of improvement, your Lordships would never require the respondents to abandon their property. This would not only be a gross violation of the public law, but evidently unjust.

The respondents might add, that they have made the fairest and most equitable offer for settling this dispute. They were willing that the mill should be given up, and that there should be one common drain made through the lands, each proprietor and possessor bearing a proportion of any loss thereby occasioned, corresponding to the advantage he might reap from the alteration. This proposition was suggested before the petitioner made the alterations in 1792, from which so much mischief has arisen. Why it was not adopted, it falls on the petitioner to explain.

The respondents will not detain your Lordships longer. The
 petitioner

petitioner has said, that the damage sustained by them is very insignificant, and would at any rate be confined within the narrowest possible bounds. But if the petitioner acted improperly in making any alteration in the mill-lead, which he knew would injure the respondents, he must be obliged to make up the loss actually sustained; and the respondents ask no more. Their claim will not be less favourably listened to, because the petitioner has for four years maintained an expensive, and the respondents hope they may now say, a most groundless litigation, rather than offer any redress.

In respect whereof, &c.

R O. C R A I G I E.

Interlocutor 22^d November 1796

The Lords having advised this Petition with the
Answers hereto, before Answer they remit to Mr
Charles Hercombie Engineer to examine the
Mill-lead in question &c - see Hercombie's
Report on the following Page —

A P.

